No. 88-401

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1988

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MARY FIORILLA,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

---

**On Writ of Certiorari to the United States Court of Appeals For the Third Circuit**

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## PETITION FOR CERTIORARI TO THE UNITED STATES SUPREME COURT OF DEFENDANT-APPELLANT MARY FIORILLA

---

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## QUESTIONS PRESENTED FOR REVIEW

1. Is it reversible error for a District Court judge to continue to poll a jury, thus revealing its numerical division, after one of the jurors has clearly expressed his disagreement with the verdict as announced.

2. Should the Supreme Court act to resolve a direct and explicit split in the Eleventh and Third Circuits on the issue of whether it is *per se* reversible error to continue to poll a jury after a juror has expressed disagreement with the verdict, and thereby provide guidance to the Courts who must deal with this recurring situation.

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## CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is officially reported at 850 F.2d 172 (3d Cir. 1988). A copy of the opinion is annexed hereto as Appendix A. The denial of defendant Mary Fiorilla's motion for rehearing *in banc* is not reported and is annexed hereto as Appendix B. The Eleventh Circuit's Decision Opinion in *United States* v. *Spitz* is officially reported at 696 F.2d 916 (11th Cir. 1983). A copy of the *Spitz* opinion is annexed hereto as Appendix C.

No. .....

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

---

MARY FIORILLA,

*Petitioner,*

VS.

UNITED STATES OF AMERICA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

## PETITION FOR WRIT OF CERTIORARI

### A. Jurisdictional Statement and Procedural History.

This is a petition for certiorari by Mary Fiorilla from a decision of the United States Court of Appeals for the Third Circuit affirming a Judgment of Conviction on an Indictment charging Mary Fiorilla with various violations of the Immigration Laws (JA 16-39). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

On May 8, 1987, after a four-week trial, a jury returned a verdict convicting Mary Fiorilla and her husband John Fiorilla on Count I, *18 U.S.C. 371* (conspiracy), Counts V through XIII, *8 U.S.C. 1324* (willfully concealing, harboring and shielding illegal aliens from detection by the INS), and Counts XIV and XV, *18 U.S.C. 1001* and *1002* (causing

false, fictitious and fraudulent statements to be made to the United States Department of Labor and the United States Immigration and Naturalization Service). Three other defendants were acquitted on all Counts.

Mary Fiorilla filed post-trial motions seeking an acquittal notwithstanding the verdict and in the alternative a new trial (JA 1923). Oral argument was heard on these motions on June 10, 1987, and by Order dated June 26, 1987, Judge Bissell denied all motions (JA 1991).

On January 26, 1987 Mary Fiorilla was sentenced to three years probation and fined $48,000 (JA 1990). A timely Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed on April 14, 1988 (JA 1993). The Third Circuit entertained oral argument and on June 30, 1988 issued an opinion affirming the judgment of the District Court in all respects. Mary Fiorilla filed a petition for rehearing which was denied by the Court on July 26, 1988. On August 11, 1988 the Third Circuit granted Mary Fiorilla's motion to stay the issuance of the mandate until September 1, 1988.

**B. Constitutional Provisions, Statutes and Rules Involved.**

The statutory provisions at issue are the United States Constitution, Amendments V, VI and XIV, and Rule 31(d) of the Federal Rules of Criminal Procedure. The pertinent provisions are annexed hereto as Appendix D.

**C. Statement of Pertinent Facts.**

After the District Court had charged it and dismissed it to deliberate, the jury purported to return a unanimous verdict. The attempted verdict exonerated one defendant on all Counts, found another defendant guilty of Count I and V through XIII and found John Fiorilla and Mary

Fiorilla guilty on all Counts charged which included Count I, Counts V through XIII and Counts XIV and XV (JA 1754).

Counsel requested the District Court to poll the jury to determine if the verdict was unanimous (JA 1756). Beginning with Juror No. 1, the Court asked each juror if he or she agreed with the verdict against John Fiorilla (JA 1757). Jurors No. 1 through No. 9 agreed with the verdict. Juror No. 10 did not. The following colloquy took place when Juror No. 10 was polled:

> *The Court*—Mr. Fonseca, do you agree or disagree with the verdict against John Fiorilla as I have just reported it?
>
> *Juror No. 10—I disagree.*
>
> *The Court*—You disagree with the verdict as reported?
>
> *Juror No. 10*—Yes. (JA 1758)

The Court did not send the jury back to continue deliberations, or declare a mistrial. The interrogation continued:

> *The Court*—Did I report it inaccurately?
>
> *Juror No. 10—Yes.*
>
> *The Court*—Let me reiterate what was stated here. As I told you, your verdict in this case had to be 12 to nothing. Correct? The verdict as I reported it as to John Fiorilla was guilty on Count I and then the next Count as to which Mr. Fiorilla was charged was Count V and it was reported as guilty on Count V. Count VI was reported as guilty. Count VII guilty. Count VIII guilty. Count IX guilty. Count X guilty. Count XI guilty. Count XII guilty. Count XIII guilty.

> Count XIV guilty and Count XV guilty. In other words, the report of the jury here on this verdict sheet was that the jury had found Mr. John Fiorilla unanimously guilty on all Counts with which he was charged. Now, what I'm asking you is do you agree or disagree with that verdict as reported here? Do you understand what I am saying?
>
> *Juror No. 10—Yes, I understand. Yes, to be honest, I have no peace in me.* (Emphasis added) (JA 1758-1759)

The Court excused the panel, except for Mr. Fonseca, and told them to return to the jury room (JA 1759). At that point, the Court realized that the jurors might be continuing their deliberations and instructed the Clerk in the following manner:

> *The Court*—Marianne, advise the jurors that they are not to resume deliberations at any time or discuss this case in any way. Please advise them of that immediately. (JA 1759)

There is no transcript of the conversation between the Court Clerk and the jury. The Trial Judge, in open court, then continued:

> *The Court*—Mr. Fonseca, I would like to hear what you have to say or what you meant by that comment and we will take it from there. When you said you have no peace in you, could you amplify that for us please?
>
> *Juror No. 10*—Sure. When we were up there in the jury room discussing defendants were guilty or not guilty, I gave my opinion and everybody gave their opinion and *when I gave mine, all of them started giving me their point of view and I kind of saw my-*

*self, you know, attacked, you know, and so I agreed but . . .*

*The Court*—Let me ask you this. You may recall that a part of my instructions was that the people were to exchange their views, obviously, and listen to what everybody else had to say.

*Juror No. 10*—Right.

*The Court*—The verdict here has been recorded as one of guilty and my first question is that some point in the or—or at least at the final voting of the jurors, did you yourself cast a vote of guilty against Mr. Fiorilla as indicated on this sheet?

*Juror No. 10*—Yes.

*The Court*—I want to take a moment and review with you a couple portions of my jury charge.

*Mr. Demarco*—Your Honor?

*The Court*—Just a minute. *All objections are preserved.*

(Emphasis added) (JA 1759-1760)

Whereupon the Court reviewed portions of its instructions relating to the need for jurors to exchange their views and listen to the arguments of their fellow jurors. Finally, the Court asked the following question:

*The Court*—Your final vote up there as reported here on the verdict sheet, did that indeed reflect your conscious conclusion as to how the issue should be decided as far as the guilt or innocence of John Fiorilla is concerned?

*Juror No. 10—No.*

*The Court*—It did not?

*Juror No. 10—No.*

(Emphasis added) (JA 1761-1762)

At this point in the proceeding, Defense counsel moved for a mistrial. The application was denied (JA 1763-1764).

The Court received a note from the other jurors. (JA 1764) It did not respond to the note. Instead, the Court summoned Juror No. 10 and polled him again, this time with respect to Mary Fiorilla and the other defendants and every Count. (JA 1766) Juror No. 10 disagreed with all of the guilty verdicts. The Court then announced its intent to call in the remainder of the jurors and poll them in an unspecified manner (JA 1768).

Before the polling began, the Court read aloud the note it had been sent from the foreman of the jury (JA 1767). No action was taken with respect to the note.

Starting with Juror No. 1, the Court polled the jury with respect to all of the Counts with which Mary Fiorilla was charged. The result was a public revelation of an 11 to 1 split as to each charge against Mary Fiorilla. This process continued with respect to each remaining defendant. The Court then excused the jury for the day (JA 1768-1775) and counsel again moved for a mistrial. The application was denied (JA 1776). As a result, Juror No. 10 went home that night knowing that the whole world was aware that he was the sole juror holding out for acquittal. After deliberating further, the jury, including Juror No. 10, eventually returned a verdict finding defendant Mary Fiorilla guilty on all Counts charged.

## ARGUMENT

## THE SUPREME COURT SHOULD ACT, PURSUANT TO ITS DISCRETIONARY POWER TO ENTERTAIN THIS APPEAL UPON PETITION FOR WRIT OF CERTIORARI, TO CORRECT THE ERRONEOUS DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

### I.

### Standard of Review.

This Court is empowered to review the decision below by 28 U.S.C. § 1254(1).

The standards that this Court must apply in determining whether or not to grant certiorari are set forth in Supreme Court Rule 17:

> 1. A review of writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> * * * * *
>
> (a) When a federal court of appeals has rendered a decision in *conflict with the decision of another federal court of appeals on the same matter;* or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (c) When a state court or a *federal court of appeals has decided an important question of federal*

> *law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with the applicable decisions of this Court.*

(emphasis added).

This case is clearly one that is appropriate for review on certiorari. The Third Circuit's Decision in this case explicitly rejects the Eleventh Circuit's holding in *United States* v. *Spitz*, 696 F.2d 916 (11th Cir. 1983). The split between the two Circuit Courts requires review by this Court in order to: (1) Preserve the constitutionality mandated right to an impartial jury trial in criminal cases, and (2) Provide clear guidance to Trial Courts that will be continually faced with this issue.

## II.

## The Third Circuit's Decision Below Is Inconsistent With This Court's Decisions and Directly Rejects the Eleventh Circuit's Holding in *United States* v. *Spitz*.

### A. This Court Has Repeatedly Discouraged Inquiry by Courts Into the Numerical Division of the Jury Before a Unanimous Verdict.

The United States Supreme Court has specifically held that an inquiry by a court into the numerical division of the jury constitutes reversible error. In *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926) this Court wrote:

> *We deem it essential to the fair and impartial conduct of the trial that the inquiry itself should be regarded as ground for reversal.* Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will

> often depend upon circumstances which *cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but, in general, its tendency is coercive.* (Emphasis added)
>
> It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge should be excluded. *Such a practice, which is never useful and is generally harmful, is not to be sanctioned.* (Emphasis added)

*Accord, Government of Virgin Islands* v. *Romain,* 600 F. 2d 435 (3d Cir. 1979); *United States* v. *Essex,* 734 F.2d 832 (D.C. Cir. 1983); *Cook* v. *United States,* 254 F.2d 871 (5th Cir. 1958); *Cornell* v. *Iowa,* 628 F.2d 1044 (8th Cir. 1980), *cert. den.* 449 U.S. 1126 (1981); *United States* v. *Sielaff,* 552 F.2d 588, 590 (7th Cir. 1977); *Jacobs* v. *United States,* 279 F.2d 826 (8th Cir. 1960); *United States* v. *Rogers,* 289 F.2d 433 (5th Cir. 1961); *United States* v. *Sae-Chua,* 725 F.2d 530, 531 (9th Cir. 1984) (giving of modified *Allen* charge after Court received juror's note reflecting eleven to one division was reversible error.)

The promulgation of Rule 31(d) of the Federal Rules of Criminal Procedure instructed lower courts to pursue one of two alternatives in this very situation:

> Rule 31. Verdict.
>
> * * * * *
>
> (d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence,

> *the jury may be directed to retire for further deliberations or may be discharged.*

(emphasis added)

This Court recently considered the danger of a *Brasfield*-type inquiry during jury polling. In *Lowenfield* v. *Phelps*, 108 S.Ct. 546 (1988), Chief Justice Renquist writing for the Court reaffirmed *Brasfield:*

> [although the decision] in *Brasfield* was an exercise of this Court's supervisory powers, it is nonetheless instructive as to the potential dangers of jury polling.

*Id.* 108 S.Ct. at 578. It is the potential danger of jury polling in exactly this situation which this Court sought to prevent in *Brasfield* and *Lowenfield.*

**B. The Eleventh Circuit's Decision in *Spitz*.**

Following this Court's decision in *Brasfield,* the Eleventh Circuit Court of Appeals has held that the District Court commits reversible error when it continues to poll a jury after one of the jurors has expressed disagreement with the verdict. In *United States* v. *Spitz,* 696 F.2d 916 (11th Cir. 1983), when the jury returned from its deliberations with a verdict of guilty against the only defendant, defense counsel requested a poll. Juror No. 8, when asked if he agreed with the verdict, replied that he did not. The Judge then continued the poll and established that the jury was divided eleven to one for conviction and then sent the jury back to deliberate. Under these facts, the Eleventh Circuit, relying on Rule 31(d) and this Court's decision in *Brasfield,* held that the trial judge had committed *per se* reversible error. The Court wrote:

> The purpose of [Rule 31(d)] is to insure that each member of the jury agrees with the verdict and to discover possible coercion. *United States* v. *Edwards,*

> 469 F.2d 1362 (5 Cir. 1972). But the effect of what the court did in this instance, by continuing the poll for no reason at all, was to establish how the jury stood numerically. To do so was *per se* error.

*United States* v. *Spitz, supra,* 696 F.2d at 917. *Accord, United States* v. *Palzer,* 745 F.2d 1350, 1352 (11th Cir. 1984) (Government confessed error when District Court erroneously polled jury after discerning the decision was not unanimous); *Government of Virgin Islands* v. *Romain,* 600 F.2d 435 (3d Cir. 1979); *United States* v. *Edwards,* 469 F.2d 1362 (5th Cir. 1972).

**C. The Third Circuit's Decision in This Case Diverges From Its Own Previous Holdings, Rejects *Spitz* and Ignores This Court's Direction to Avoid Inquiry Into the Numerical Standing of Juries.**

The Third Circuit's decision below contradicts its own previous decision in *United States* v. *Aimone,* 715 F.2d 822, 833 (3d Cir. 1983), *cert. den.* 468 U.S. 1217 (1984) in which the Third Circuit approved the rationale of *Spitz.* In *Aimone,* the jury returned a verdict of guilty. The Judge began to poll the jury and one of the jurors expressed her disagreement with the verdict. Pursuant to Rule 31(d), the Judge returned the jury to continue its deliberations. The *Aimone* court held that the Judge acted properly in returning the jury to continue its deliberations. In upholding the Trial Judge's actions, the Court wrote:

> Moreover, we have held it to be error for a trial judge to inquire into the numerical division of the jury when informed that a jury has been unable to reach a decision. *Government of Virgin Islands* v. *Romain,* 600 F.2d 435 (3d Cir. 1979); *see Brasfield* v. *United States,* 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345 (1926). Had the trial judge continued the first poll after Juror No. 4 dissented, the numerical divi-

> sion of the jury would have been revealed. *Once a juror has dissented from the verdict, there is no need for further polling and to continue the process without the opportunity for further deliberations is erroneous. See United States* v. *Spitz*, 696 F.2d 916 (11th Cir. 1983) (per se error to continue polling).

(Emphasis added)

In its decision in this case, the Third Circuit holds that *Spitz* was incorrectly decided and rejects the *per se* rule which it embraced in *Aimone*. In that regard, the Court writes:

> The decisions in the *Amos* and *Brooks* cases seem to us to be consistent with the rules adopted since *Brasfield* and to represent the better approach to an inadvertent disclosure of jury's division through polling. *Accordingly, we reject the Spitz view that the Supreme Court's Brasfield holding requires per se reversal in the context of a jury poll in favor of a rule vesting discretion in the trial court.*

Slip. Op. at 11, Appendix A (emphasis added).

The holding below directly contradicts the unequivocal holding of the Third Circuit Court in *Aimone* that "to continue the process without the opportunity for further deliberation is erroneous" and further, it creates confusion in the Circuits regarding a District Court's discretion to inquire into the numerical split of the jury before the final verdict.

## III.

## Conclusion.

The Third Circuit's decision to ignore its own holding in *Aimone*, the Eleventh Circuit's holding in *Spitz* and Chief Justice Renquist's admonition in *Lowenfield* requires plenary consideration by this Court in order to preserve uniformity of application of the law in this area and to prevent the lower Courts from impermissible intrusions into the deliberations of juries before a unanimous verdict has been returned.

For all of the foregoing reasons, Mary Fiorilla respectfully submits that her Petition for Certiorari should be granted.

Respectfully submitted,

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Dated: August 29, 1988

*On the Petition:*

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# APPENDICES

## APPENDIX A

**The Opinion of the United States Court of Appeals for the Third Circuit**

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 87-5445 & 87-5446

---

UNITED STATES OF AMERICA,

*Appellee,*

v.

JOHN FIORILLA,

*Appellant at No. 87-5445.*

---

UNITED STATES OF AMERICA,

*Appellee,*

v.

MARY FIORILLA,

*Appellant at No. 87-5446.*

---

Appeal from the United States
District Court for the
District of New Jersey
(D.C. Criminal Nos. 86-00291-01
and 86-00291-02)

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Argued: April 14, 1988

Before: HUTCHINSON, SCIRICA and
ROSENN, *Circuit Judges*

(Opinion Filed June 30, 1988)

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*Appendix A—The Opinion of the United States Court of Appeals for the Third Circuit*

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---

OPINION OF THE COURT

---

HUTCHINSON, *Circuit Judge*

Defendant-appellants John and Mary Fiorilla (the Fiorillas) appeal from judgments of sentence imposed after a jury found them guilty of violating 8 U.S.C.A. § 1324 (West Supp. 1988), 18 U.S.C.A. § 371 (West 1966) and 18

U.S.C.A. § 1001 (West 1976).[1] We have jurisdiction over this appeal from a final order of the district court. 28 U.S.C.A. § 1291 (West Supp. 1988). Appellants contend that the district court erred in failing to grant their request for a new trial when a poll taken following the announcement of the purportedly unanimous verdict revealed a dissident within the jury. The trial judge ordered the jurors to continue their deliberations. They did and returned unanimous verdicts. Because the trial judge properly determined that the inadvertent disclosure of the venire's division did not coerce the recalcitrant juror, we believe he had discretion to order the verdict recorded. On this record that discretion was not abused. We will therefore affirm the judgments of sentence.[2]

The Fiorillas had been indicted along with three co-defendants on one count of conspiracy to harbor illegal aliens, 18 U.S.C.A. § 371, and nine substantive counts of harboring illegal aliens, 18 U.S.C.A. §§ 2 and 3124. The Fiorillas were also charged with two counts of false statements to the United States Labor Department and the Immigration and Naturalization Service in violation of 18 U.S.C.A. §§ 2 and 1001. After the trial, the jury informed the court that it had reached a verdict, returned to the courtroom and delivered its decision. John and Mary

---

[1] 8 U.S.C.A. § 1324 makes unlawful bringing aliens not duly admitted by an immigration officer or not lawfully entitled to enter the United States into the United States and harboring them. 18 U.S.C.A. § 371 makes unlawful a conspiracy to commit any offense against the United States. 18 U.S.C.A. § 1001 prohibits the making of false statements or representations to any department or agency of the United States.

[2] Appellants raise eight additional contentions, listed in the appendix, which we have fully considered and will reject without discussion in the opinion.

Fiorilla were found guilty on all counts with which they had been charged under the jury foreman's original announcement of the collective verdict. Thomas Fiorilla, Frances Scullion and Charles Hirschkind were also on trial with appellants John and Mary Fiorilla for charges stemming from the employment of aliens at appellants' nursing homes. Thomas Fiorilla was found not guilty on counts one through four and guilty on counts five through thirteen. Frances Scullion was found guilty on count one and counts five through thirteen and not guilty on counts two through four. Charles Hirschkind was found not guilty on all counts. Counsel for John Fiorilla then asked to poll the jury.

The individual jurors were first asked whether they concurred in the verdict as it related to John Fiorilla. Jurors one through nine agreed with the reported verdict. With juror number ten, this colloquy ensued:

> The Court: Mr. Fonseca, do you agree or disagree with the verdict against John Fiorilla as I have just reported it?
>
> Juror No. 10: I disagree.
>
> The Court: You disagree with the verdict as reported?
>
> Juror No. 10: Yes.
>
> The Court: Did I report it inaccurately?
>
> Juror No. 10: Yes.
>
> The Court: Let me reiterate what was stated here. As I told you, your verdict in this case had to be 12 nothing. Correct?
>
> . . . .

> In other words, the report of the jury here on this verdict sheet was that the jury had found Mr. John Fiorilla unanimously guilty on all counts with which he was charged. Now, what I am asking you is do you agree or disagree with that verdict as reported here?
>
> Do you understand what I am saying?
>
> Juror No. 10: Yes, I understand. Yes, to be honest, I have no peace in me.

Jt. App. at 1758-59. The trial court excused the other eleven jurors and then renewed his discussion with Mr. Fonseca:

> The Court: Mr. Fonseca, I'd like to hear what you have to say or what you meant by that comment and we will take it from there. When you said you have no peace in you, could you amplify that for us, please?
>
> Juror No. 10: Sure. When we were up there in the jury room discussing [sic] the defendants were guilty or not guilty, I gave my opinion and everybody gave their opinion and when I gave mine all of them started giving me their point of view and I kind of saw myself, you know, attacked, you know, and so I agreed. But—

*Id.* at 1759-60. At that point, the trial judge reread to Mr. Fonseca that portion of the charge to the jury referring to a juror's obligation to deliberate with a view to reaching an agreement, consistent with language approved by this Court in *United States* v. *Fioravanti,* 412 F.2d 407 (3d Cir.), *cert. denied,* 396 U.S. 837 (1969). Once again, juror Fonseca reiterated his position that the verdict sheet

did not reflect his view on the guilt or innocence of John Fiorilla.

All counsel then agreed with the trial court's suggestion that Mr. Fonseca be questioned on his position about the other defendants. So questioned, this juror expressed his disagreement with all of the jury's findings of guilt against Mary Fiorilla. He then voiced agreement with the findings exonerating Thomas Fiorilla and Frances Scullion but disagreed with all of the guilty findings against these last two defendants. On defendant Charles Hirschkind, juror Fonseca agreed with the determination of innocence on all counts. Since no discrepancy appeared as to Mr. Hirschkind, a verdict of acquittal was recorded as to him.

The trial judge then revealed his intention to continue the poll as to the remaining jurors. At this point, counsel advanced no objection to the trial court's proposal to interrogate the other members of the venire.[3] Jurors eleven and twelve indicated their agreement with the reported verdicts as to John Fiorilla. The eleven jurors then stated their approval of Mary Fiorilla's guilty verdicts. Similarly, the eleven voiced their assent in the guilty findings as to Thomas Fiorilla and Frances Scullion. Through the polling of the jurors in this manner,

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[3] Appellants point out that immediately following juror Fonseca's disclosure, the trial judge stated: "All objections are preserved." Jt. App. at 1760. This comment came at a point when the judge sought to converse with the one juror without the distractions of counsel. Before the remaining jurors were brought back into the courtroom, the trial judge gave counsel ample opportunity to argue the problem and to raise any objections concerning the continued polling. It would be inappropriate to decide this case on waiver grounds. We note, however, counsel's failure to object contemporaneously and specifically to the polling of the other eleven jurors as evidence of an absence of a coercive atmosphere. *See infra* typescript at 12.

an eleven to one division on the guilty verdicts became apparent. The trial court temporarily excused the jury but ordered them to return for further deliberations the following morning.

The next morning, the trial judge informed counsel of an Eleventh Circuit decision, *United States* v. *Spitz,* 696 F.2d 916 (11th Cir. 1983) (per curiam), which held that a trial judge may not continue a poll once a dissenter has emerged. Although the trial judge was not yet prepared to grant a mistrial on this basis, he sought to give all counsel the benefit of his research. In the meantime, he ordered the jury to continue its deliberations. After two days of additional deliberations, the jury returned a verdict finding John and Mary Fiorilla guilty on all counts but completely exonerating Thomas Fiorilla and Frances Scullion. A second poll of the jury showed no discrepancy between the reported collective verdicts and the jurors' individual votes.

In their post-trial motions the Fiorillas renewed their request for a mistrial because the trial judge continued the jury poll after juror number ten voiced disagreement with the initially reported collective verdict. After briefing and oral argument, the district court ruled that the jury poll did not warrant the granting of a new trial under the unique circumstances of this case. The appellants now renew their argument that the continued polling of the jury, following the dissent of one of its members, requires the granting of a new trial. In support, appellants cite the decision in *Brasfield* v. *United States,* 272 U.S. 448 (1926). In that case, the Supreme Court held it is improper for a trial court to inquire into the numerical division of a jury. They also point to the opinion in *United*

*States* v. *Spitz, supra,* in which the Eleventh Circuit extended the *Brasfield* rule to jury polls. We believe the trial judge has a limited discretion to determine whether the circumstances demonstrate a lack of coercion upon the initially dissenting member of the jury. We will therefore review the district court's order denying a mistrial for an abuse of that discretion. Since a lack of coercion is demonstrated by this record, we find no abuse of discretion.

In *Brasfield,* after "some" hours of deliberation, the trial judge inquired as to how the jury stood numerically. Without revealing which jurors favored conviction, the foreman disclosed that the jury stood nine to three. In reversing, Justice Stone stated:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

272 U.S. at 450. This Court has relied upon the *Brasfield* prohibition to condemn a trial judge's sending a note to the jury foreman to determine the jury's division. *Government of the Virgin Islands* v. *Romain*, 600 F.2d 435 (3d Cir. 1979).[4]

Neither *Brasfield* nor *Romain* was decided in the context of a jury poll. In addition, *Brasfield* was decided before the adoption of the Federal Rules of Criminal Procedure which expressly permit polling of the jury in a criminal case. Fed.R.Crim.P. 31(d). However, the Eleventh Circuit, in *Spitz*, held that the rule in *Brasfield* does extend to the polling of a jury pursuant to Fed.R. Crim.P. 31(d). *Spitz* involved a single defendant. Following the announcement of a guilty verdict, a juror voiced her disagreement. The trial court continued the polling. The appellate court, citing *Brasfield*, held that "the effect of what the court did in this instance, by continuing the poll for no reason at all, was to establish how the jury stood numerically. To do so was per se error." 696 F.2d at 917. To this ruling, the court carved an "exceptional circumstance" limitation to the reversal requirement. "An exceptional circumstance may arise when there is an apparent confusion on the juror's part that

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[4] Since *Brasfield* makes no mention of the due process clause or any other constitutional protection, other Courts of Appeals have rejected the contention that the *Brasfield* bar must be adhered to when reviewing state criminal proceedings on *habeas corpus*. *E.g.*, *Williams* v. *Parke*, 741 F.2d 847 (6th Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985); *Locks* v. *Sumner*, 703 F.2d 403 (9th Cir.), *cert. denied*, 464 U.S. 933 (1983); *Cornell* v. *Iowa*, 628 F.2d 1044 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Ellis* v. *Reed*, 596 F.2d 1195 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979). *See also Lowenfield* v. *Phelps*, —— U.S. ——, 108 S.Ct. 546, 552 n.3 (1988).

may be clarified by interrogation by the court. . . ." *Id.* at 918 n.1.[5]

At least two Courts of Appeals have chosen not to require *per se* reversal once a jury poll reveals an internal division of the jurors. In *Amos* v. *United States*, 496 F.2d 1269 (8th Cir.), *cert. denied*, 419 U.S. 896 (1974), the Eighth Circuit distinguished *Brasfield* and held that Fed. R.Crim.P. 31(d)[6] grants a trial court conducting a jury poll a certain measure of discretion in clearing up confusion once a verdict is returned. The opinion stresses that "since the trial judge is present on the scene, we must

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[5] We note that this Court, in *United States* v. *Aimone*, 715 F.2d 822, 833 (3d Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984), cited *Spitz* for the proposition that to continue polling after a juror has dissented is erroneous. Since that particular issue was not under scrutiny in Aimone, the reference to the *Spitz* rule is a *dictum* which we choose not to follow. Additionally, we are aware of a passage within the Supreme Court's recent decision in *Lowenfield* v. *Phelps*, *supra*, wherein Chief Justice Rehnquist stated: "Although the decision in *Brfasfield* was an exercise of this Court's supervisory powers, it is nonetheless instructive as to the potential dangers of jury polling." 108 S.Ct. at 552 (footnote omitted). We do not believe that this sentence must be interpreted to reflect the Supreme Court's extension of *Brasfield* to the jury polling context. The Supreme Court has never expressly considered the issue. *Lowenfield* dealt only with a state trial judge's inquiry of a jury as to whether continued deliberations would be helpful in obtaining a verdict. The poll sought to determine whether the members of the jury thought that a hung jury was inevitable. It was not designed to ascertain the numerical division of the jurors on the question of the penalty to be imposed in a capital case.

[6] Fed.R.Crim.P. 31(d) reads as follows:

> (d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

pay due deference to his views on whether the recalcitrant juror's ultimate acquiescence in the verdict came freely, without pressure from the court." *Amos,* 496 F.2d at 1273. Similarly, in *United States* v. *Brooks,* 420 F.2d 1350 (D.C. Cir. 1969), a jury poll revealed two jurors who did not fully agree to the guilty verdicts announced by the forewoman in a multiple-count criminal prosecution. Defense counsel requested that the remaining jurors be polled. Questioning of the two recalcitrant jurors led to one juror's agreeing to the guilty verdict on the controverted count. The court ordered the jury to deliberate further. Following twenty minutes of additional deliberations, the jury found the defendant guilty on that count upon which, because of the jury's division, the court had not accepted a verdict. The District of Columbia Circuit also noted that Fed.R.Crim.P. 31(d) invests the trial court with discretion and that such discretion must be accorded proper deference by a reviewing court. *Brooks,* 420 F.2d at 1353. The court also cited the fact that defense counsel requested the poll and failed to object to questioning of the jurors as significant factors in upholding the judgment of sentence. *Id.* at 1354. Finally, the court emphasizes that, unlike the trial judge's inquiry in *Brasfield,* jury polling is both a necessary and useful device for preserving a defendant's right to a unanimous verdict. *Id.* at 1354.

*Brasfield* was decided on supervisory rather than constitutional grounds in 1926, a time before any independent federal rules governing criminal procedure had been adopted. *Cf. United States* v. *Noah,* 594 F.2d 1303, 1305 (9th Cir. 1979) (per curiam) (Kilkenny, J., dissenting) (questions continuing vitality of *Brasfield* rule after en-

actment of Federal Rules of Criminal Procedure incorporating the harmless error rule). The decisions in the *Amos* and *Brooks* cases seem to us to be consistent with the rules adopted since *Brasfield* and to represent the better approach to an inadvertent disclosure of a jury's division through polling. Accordingly, we reject the *Spitz* view that the Supreme Court's *Brasfield* holding requires *per se* reversal in the context of a jury poll in favor of a rule vesting discretion in the trial court. It cannot be gainsaid that a trial judge is in the best position to weigh the circumstances peculiar to each trial and determine whether a poll coerced a juror into acquiescing in the majority demands. This approach is not inconsistent with our holding in *United States* v. *Aimone*, 715 F.2d 822 (3d Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984). In *Aimone*, a juror initially expressed disagreement during a poll. The trial judge ordered that deliberations continue without further polling. A unanimous guilty verdict was then recorded. We held that the court properly ordered further deliberations despite a motion for a mistrial. We emphasized that an appellate court must defer to the judgment of the trial judge in such situations, particularly in lengthy trials. *Id.* at 832.

Here, the trial court carefully considered and rejected appellants' request for a new trial. In so ruling, the court referred to a number of factors surrounding the continuation of the jury poll after Mr. Fonseca's dissent. They include counsels' failure to voice a specific and contemporaneous objection to the polling, which demonstrates to some degree the absence of a coercive atmosphere. Upon learning of the dissidence, the trial judge dismissed the jurors for the day. This removed Mr. Fonseca from the

immediate "attacks" of his peers. Before deliberations resumed the next day, the trial judge delivered a cautionary instruction asking the jurors to carefully weigh and consider the views of their fellow jurors. Most important was the trial court's reliance on the deliberations having continued for an additional two days before the jury returned unanimous guilty verdicts against the appellants. The district court concluded that this lapse of time before the return of guilty verdicts demonstrated that the lone dissenting juror was not coerced by the poll to capitulate to the views of the majority. *Cf. Brooks*, 420 F.2d at 1353-54 (jury's returning verdict after twenty minutes of deliberations after poll upheld). Although Mr. Fonseca initially stood as the lone vote for acquittal on Thomas Fiorilla's and Frances Scullion's verdicts, the jury ultimately acquitted them. His views on these two defendants in the end carried the day. Thus, it was plain to the district judge, as it is to us, that Mr. Fonseca was not afraid to stand up for his convictions and that his peers took his opinions seriously during their two days of further deliberations.

We also accept as appropriate the district court's assertion that it was attempting to take partial verdicts wherever possible in a relatively complex multi-count, multi-defendant criminal prosecution. Appellate courts should be willing to allow trial judges discretion to deal with the exigencies that are bound to arise in today's modern multi-party litigation. While it may generally be preferable to immediately conclude a poll and return the jury for further deliberations once a dissent is noted, we find no abuse of discretion in the course taken here.

Accordingly, the judgments of the district court will be affirmed in all respects.

*Appendix A—The Opinion of the United States Court of Appeals for the Third Circuit*

*APPENDIX*

Listing of Contentions Raised and Rejected but not Discussed in Opinion

A. Contentions of Both John and Mary Fiorilla:

1. The district court erred in allowing the testimony of Immigration and Naturalization Service Agent John Lonergan.
2. The district court erred in admitting the arrest book into evidence.
3. The district court erred in refusing to disclose the identity of Immigration and Naturalization Service Agent Michael Bassanta.
4. The district court erred in failing to unseal the transcript of the *ex parte* discussion with the prosecutor.

A. Contention of John Fiorilla:

5. The district court erred in failing to grant John Fiorilla's motions for judgments of acquittal.

C. Contentions of Mary Fiorilla:

6. The district court erred in allowing into evidence inflammatory and prejudicial evidence.
7. The evidence was insufficient to support Mary Fiorilla's convictions.
8. The district court's jury instructions were erroneous.

*Appendix A—The Opinion of the United States Court of Appeals for the Third Circuit*

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit*

## APPENDIX B

### Denial of Mary Fiorilla's Motion for Rehearing *In Banc*

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 87-5446

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UNITED STATES OF AMERICA,

*Appellee,*

v.

MARY FIORILLA,

*Appellant.*

(D.C. Criminal No. 86-00291-02)

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SUR PETITION FOR REHEARING

Present:

SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and ROSEN, *Circuit Judges*

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

*Appendix B—Denial of Mary Fiorilla's Motion for Rehearing In Banc*

voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Wm. D. Hutchinson
Circuit Judge

Dated: July 26, 1988

## APPENDIX C

### Eleventh Circuit's Opinion in *United States* v. *Spitz*

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UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

PETER SPITZ,
*Defendant-Appellant.*

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No. 81-5306.

United States Court of Appeals,
Eleventh Circuit.

Jan. 24, 1983.

Defendant was convicted before the United States District Court for the Southern District of Florida, James C. Paine, J., of conspiracy to import marijuana into the United States, and he appealed. The Court of Appeals held that continuation of poll of jury after lack of unanimity was revealed was reversible error.

Reversed.

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Kogan & Cogan, Dennis J. Cogan, Philadelphia, Pa., for defendant-appellant.

Bruce Zimet, Asst. U.S. Atty., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY and JOHNSON, Circuit Judges, and DYER, Senior Circuit Judge.

## *Appendix C—Eleventh Circuit's Opinion in United States* v. *Spitz*

PER CURIAM:

Spitz appeals his conviction of conspiracy to import marijuana into the United States in violation of 18 U.S.C. § 963. He does not challenge the sufficiency of the evidence to support his conviction, but claims error in the continuation of the poll of the jury after its lack of unanimity was revealed. We agree and reverse.

The jury informed the court that it had reached a verdict, returned to the court-room, and a guilty verdict was returned. At the defendant's request the jurors were polled in the numerical order of their seating. The first seven jurors assented to the verdict. Thereafter the following occurred:

> The Clerk: Roberta A. McNeil, is the verdict as published as to Peter Spitz your verdict?
>
> Juror: No.
>
> The Court: Well, let's poll the remainder of the jury, please, and come back.

The remaining four jurors assented to the verdict. The court continued:

> The Court: All right. You may be seated, ladies and gentlemen. Roberta McNeil, would you please stand. You have indicated that this is not your verdict, is that correct?
>
> Juror: Yes, sir.
>
> The Court: All right. Now ladies and gentlemen of the jury . . .

The court then proceeded to give the "approved" *Allen* charge, during which he told Mrs. McNeil that she could

sit down. The jury then retired and returned a half hour later with a unanimous guilty verdict.

Fed.Rule Cr. Proc. rule 31(d) provides:

> If upon the poll there is not unanimous concurrence, the jury may be directed to return for further deliberation or may be discharged.

The purpose of the rule is to insure that each member of the jury agrees with the verdict and to discover possible coercion. *United States* v. *Edwards,* 469 F.2d 1362 (5 Cir.1972). But the effect of what the court did in this instance, by continuing the poll for no reason at all, was to establish how the jury stood numerically. To do so was per se error. In *Brasfield* v. *United States,* 272 U.S. 448, 47 S.Ct. 135, 71 L.Ed. 345, the Court in unequivocal language condemned such inquiry saying:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. The effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded.

> Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

We were faced with a somewhat similar problem in *Sincox* v. *United States,* 571 F.2d 876 (5 Cir.1978), in which a juror responded to a poll of the published verdict, "Yes. With a reasonable doubt." The court then polled the remaining jurors and accepted a verdict of guilty. We reversed, saying, "When Juror Lewis was polled and stated that he had a reasonable doubt the trial judge had the duty either to order the jury to return for further deliberations or to dismiss them. Absent exceptional circumstances, not here applicable, there was no third option." [1] *See United States* v. *Edwards, supra.*

The question of the remaining jurors after Ms. McNeil stated that the published verdict was not her verdict could have been perceived as attempted coercion of her. In any event it was an exercise of a forbidden "third option." The poll should have stopped as soon as the lack of unanimity was revealed. *United States* v. *Warren,* 594 F.2d 1046 (5 Cir.1979). Failure to do so was error.[2]

Reversed.

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[1] An exceptional circumstance may arise when there is an apparent confusion on the juror's part that may be clarified by interrogation by the court—a circumstance not here present.

[2] Our disposition of the case makes it unnecessary for us to reach or decide the other errors asserted by Spitz.

## APPENDIX D

### United States Constitution, Amendments V, VI and XIV and Rule 31(d) of the Federal Rules of Criminal Precedure

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## *Appendix D—United States Constitution, Amendments V, VI and XIV and Rule 31(d) of the Federal Rules of Criminal Procedure*

### Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Materials for the Citizenship and Privileges and Immunities Clauses of Section 1 are set out in this volume. See the following three volumes for materials pertaining to the Due Process and Equal Protection Clauses of that section and Sections 2 to 5.

*Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Section 2.* Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in

any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

*Section 3.* No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

*Section 4.* The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

*Section 5.* The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## *Appendix D—United States Constitution, Amendments V, VI and XIV and Rule 31(d) of the Federal Rules of Criminal Procedure*

*Rule 31. Verdict*

*(a) Return.* The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

*(b) Several Defendants.* If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

*(c) Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

*(d) Poll of Jury.* When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

*(e) Criminal Forfeiture.* If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972.)